

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARK DEMOS,

Petitioner,

v.

MICHAEL CHERTOFF, *et al.*,

Respondents.

CASE NO. C03-3243-RSL-MJB

REPORT AND
RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

On October 28, 2003, petitioner Mark Demos filed, through counsel, a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, challenging his final order of exclusion. (Dkt. #1). At the same time, petitioner also filed an Emergency Motion for Stay of Exclusion *pendente lite*. (Dkt. #2). On October 29, 2003, the Court entered a temporary stay of petitioner's exclusion from the United States pending resolution of the habeas petition in this Court. (Dkt. #5). This habeas corpus matter has subsequently been held in abeyance by agreement of the parties pending decision on petitioner's motion to reopen before the Board of Immigration Appeals, and his appeal from the denial thereof to the Court of Appeals for the Ninth Circuit. (Dkt. #28).

On June 7, 2005, respondents filed a Motion to Dismiss petitioner's habeas petition pursuant

1 to the recently enacted REAL ID Act of 2005, Pub. L. No. 109-13, §§ 101 and 106, 119 Stat. 231
 2 (May 11, 2005) (“REAL ID Act”), arguing that the District Court lacks subject matter jurisdiction
 3 to review petitioner’s habeas petition, and therefore, there is no reason to continue to hold this
 4 matter in abeyance. (Dkt. #27). On June 27, 2005, petitioner filed a response, contending that §
 5 106(c) of the REAL ID Act requires this Court to transfer the instant case to the Ninth Circuit
 6 Court of Appeals. (Dkt. #29). Respondents acknowledge that the REAL ID Act contains a
 7 mechanism for transferring habeas petitions to the appropriate court of appeals, and state that they
 8 have no objection to the transfer of this case to the Ninth Circuit. (Dkt. #30).

9
 10 In light of the recent enactment of the REAL ID Act, I recommend that petitioner’s habeas
 11 petition be transferred to the Ninth Circuit Court of Appeals as a Petition for Review.

12 TRANSFER OF JURISDICTION

13 On May 11, 2005, the President signed into law the REAL ID Act of 2005. Under Section
 14 106(a)(1)(B) of the REAL ID Act, two new paragraphs (4 and 5) were added to 8 U.S.C. §
 15 1252(a), which governs judicial review of removal orders. Paragraph 5 of 8 U.S.C. § 1252(a) has
 16 particular relevance to this case; it provides:

17 (5) EXCLUSIVE MEANS OF REVIEW.--Notwithstanding any other provision of
 18 law (statutory or nonstatutory), including section 2241 of title 28, United States
 19 Code, or any other habeas corpus provision, and sections 1361 and 1651 of such
 20 title, a petition for review filed with an appropriate court of appeals in accordance
 21 with this section shall be the sole and exclusive means for judicial review of an order
 22 of removal entered or issued under any provision of this Act, except as provided in
 subsection (e). For purposes of this Act, in every provision that limits or eliminates
 judicial review or jurisdiction to review, the terms ‘judicial review’ and ‘jurisdiction
 to review’ include habeas corpus review pursuant to section 2241 of title 28, United
 States Code, or any other habeas corpus provision, sections 1361 and 1651 of such
 title, and review pursuant to any other provision of law (statutory or nonstatutory).

23 Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005) (Division B, Section 106(a)(B)). This provision
 24 explicitly deprives this Court of jurisdiction under 28 U.S.C. § 2241 to review an order of removal,

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1 deportation, or exclusion entered under the Immigration and Nationality Act. Moreover, Section
2 106(b) of the REAL ID Act explicitly provides that Section 106(a) is retroactive: “subsection (a)
3 shall take effect upon the date of enactment of this division and shall apply to cases in which the
4 final administrative order of removal, deportation, or exclusion was issued before, on, or after the
5 date of enactment.” Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005) (Division B, Section
6 106(a)(B)). In this action, petitioner seeks judicial review of a final administrative order of
7 exclusion. Accordingly, under the REAL ID Act, this Court no longer has jurisdiction to entertain
8 this action.

9
10 However, Section 106(c) of the REAL ID Act provides that if any § 2241 habeas corpus
11 case challenging a final administrative order of removal, deportation, or exclusion is pending in a
12 district court on the date of enactment, “then the district court *shall* transfer the case (or any part
13 of the case that challenges the order of removal ...) to the [appropriate] court of appeals.” Pub. L.
14 No. 109-13, 119 Stat. 231 (May 11, 2005) (Division B, Section 106(c))(emphasis added).
15 Accordingly, this action should be transferred to the Ninth Circuit Court of Appeals for resolution
16 as a Petition for Review in accordance with § 106(c) of the REAL ID Act.

17 CONCLUSION

18 For the foregoing reasons, I recommend that this case be transferred to the Ninth Circuit
19 Court of Appeals as a Petition For Review pursuant to Section 106(c) of the REAL ID Act. A
20 proposed Order accompanies this Report and Recommendation.

21 DATED this 25th day of July, 2005.



22
23 MONICA J. BENTON
United States Magistrate Judge